PACIFIC COAST COAL CO., INC.

IBLA 89-657 Decided December 9, 1992

Appeal from a decision of the Office of Surface Mining Reclamation and Enforcement rejecting a reclamation bond application. WA-007-A-B-3-004.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Bonds: Generally--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Generally

   Departmental regulation 30 CFR 800.21 does not allow hypothecation of real property not owned by a permittee to insure mine reclamation.

APPEARANCES: David J. Morris, President, Pacific Coast Coal Co., Inc., Black Diamond, Washington, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Pacific Coast Coal Co., Inc. (Pacific), has appealed from a June 7, 1989, decision of the Chief, Federal Programs Division, Office of Surface Mining Reclamation and Enforcement (OSM), that rejected an offer
by Pacific to use real property not owned by the corporation as security
for a performance bond to insure reclamation of the John Henry Mine No. 1, permit No. WA-007. Pacific had offered property that belonged to Palmer Coking Coal Company, a partnership organized under Washington law, as part of an offer to establish a real property collateral bond to substitute for part of a letter of credit previously furnished by Pacific to OSM in the amount of $2,209,300. The relationship of the two companies is not shown in the record, although the addresses of both are given as Black Diamond, Washington.

Relevant to the facts of this appeal, the term "collateral bond" is defined by Departmental regulation as "an indemnity agreement in a sum certain executed by the permittee as principal which is supported by the deposit with the regulatory authority of * * * [a] perfected, first lien security interest in real property in favor of the regulatory authority." 30 CFR 800.5(b)(5). Citing 30 CFR 800.21(c), the rule that establishes standards for collateral bonds, OSM determined that it could accept the real property offered as security, but was authorized to do so only if

record title to the land was held by Pacific. The regulation cited provides that:

> Real property posted as a collateral bond shall meet the following conditions:
>
> (1) The applicant shall grant the regulatory authority a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell or otherwise dispose of the property in the event of forfeiture under § 800.50.
>
> (2) * * * the applicant shall submit * * * [p]roof of possession and title to the real property.

30 CFR 800.21(c)(1) and (2)(iii).

Pacific contends the Departmental regulation quoted above permits the transaction that it has offered. OSM contends that the rule does not authorize hypothecation of land by anyone other than the permittee for purposes of furnishing a collateral bond. OSM is the regulatory authority for the State of Washington. 30 CFR 947.700. Departmental regulation 30 CFR 947.800 applies the Federal program surface mining bonding requirements found at 30 CFR Part 800 to surface coal mining and reclamation operations there. The relevant regulation, 30 CFR 800.21(c)(2)(iii), requires an applicant to submit to OSM proof of possession and title to the real property that will be hypothecated. The record establishes that Pacific furnished information that established, among other things, that the record owner of the property was Palmer Coking Coal Company, a partnership whose manager participated in the bond application. OSM concluded that it lacked authority to accept a mortgage from a third party, concluding that authority to do so was not conferred by existing rules.

The history of OSM bonding regulations is complex. An analysis of the history of these rules establishes that there was a separate evolution of two distinct bonding methods: self-bonding and collateral bonding. As adopted in 1979, the bonding regulations allowed submission of a self-bond by a permittee but required submission of a mortgage or security interest in real or personal property, including a leasehold interest, in an amount at least equal to the bond. See 30 CFR 806.11(b)(4)(iii) (1979). Collateral bonding was then limited to an indemnity agreement between the permittee and regulatory authority supported by a deposit of cash, negotiable instruments, or letters of credit. See 30 CFR 800.5 (1979).

Provisions relating to self-bonding, particularly the requirement that a permittee provide a security interest in property as a precondition thereof, proved controversial. A petition to amend this regulation was granted on September 6, 1979 (44 FR 51098), and on January 24, 1980, a notice of proposed rulemaking was published. See 45 FR 6028. In revisions adopted on August 6, 1980 (45 FR 52320), language providing for

submission of security interests in real or personal property, including leaseholds, was added to the collateral bonding regulations. There was no change in the language requiring submission of such interests with respect to self-bonding. See 30 CFR 806.12(h), 806.14(a)(4) (1981).
Owing to the Department's failure to amend the self-bonding regulations, resulting litigation challenging these regulations led to suspension of parts of the regulations. See 46 FR 59934 (Dec. 7, 1981).

Revisions of both the collateral and self-bonding regulations were again proposed in 1981. See 46 FR 45094 (Sept. 9, 1981). As adopted
in 1983 (see 48 FR 32932-64 (July 19, 1983) and 48 FR 36418-30 (Aug. 10, 1983)), language permitting submission of personal property or leasehold interests as security for collateral bonding was removed. See 30 CFR 800.5(b), 800.21(c) (1983). These amendments also deleted the requirement that a self-bonding company must provide a security interest in
real property. While, before these amendments were made, self-bonding indemnity agreements could only be executed by the permittee (see 30 CFR 800.5, 806.14(a)(4)(iii) (1982)), the new rules permitted a parent company to guarantee self-bonding. See 30 CFR 800.5(c), 800.23(b) (1983).

Some persons argued that the self-bonding provisions were still too restrictive and, in 1985, a rulemaking petition was filed to permit the use of third-party, non-parent guarantors in the self-bonding situation. See 50 FR 43723 (Oct. 29, 1985). This was approved as a proposed rule on July 7, 1986 (51 FR 24548), finally adopted on January 14, 1988 (53 FR 996). The regulation now provides that third-party non-parent companies may guarantee a permittee seeking a self-bond. 30 CFR 800.5(c), 800.23(c)(2) (1991). Pacific points to this last amendment of the self-bonding rules and argues that, since the purpose of the rules is to assure "completion of the reclamation plan, at no expense to the public," and inasmuch as the Department already accepts third-party guarantors in the context of self-bonding, it should be permitted to offer a third-party mortgage of real property under the collateral bonding regulations. We must reject this contention.

While at one time both the collateral and self-bonding regulations
had provisions relating to the submission of security interests in real property, they have proceeded along separate paths of development. In
1983 the Department amended the regulations to permit a parent company, acting as a guarantor, to qualify a permittee for self-bonding. In 1988 the regulations were again amended to permit non-parent third parties to act as guarantors. The fact that the Department found it was necessary to amend the self-bonding rule in this fashion, however, establishes that, as the rules were originally promulgated, neither parent companies nor non-parent third parties were authorized to guarantee or bond permittees. The amendments made applied only to self-bonding. The provisions of the collateral bonding regulations were not amended in similar fashion. Since the language of these two related bonding provisions was identical until the 1983 amendments, the conclusion is inescapable that, without similar amendments to the collateral bonding regulations, neither parent companies nor third-party non-parent companies can tender the security interests required by the regulations. We must therefore conclude that OSM was correct in

holding that the regulations do not permit the acceptance of security interests created by third parties or parent corporations under the collateral bonding regulations.

On the record before us therefore, Pacific has not shown that it was error for OSM to require that a collateral bond conform to a requirement that real property offered to secure the bond should be owned by the coal lease applicant. Whether OSM should further rationalize the bonding regulations sanctioning collateral bonds in the manner proposed by Pacific is a matter properly addressed in rulemaking.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of OSM is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

James L. Burski
Administrative Judge